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No. 75-4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NORTHERN INDIANA PUBLIC SERVICE COMPANY,
Petitioner,

v.

PORTER COUNTY CHAPTER OF THE IZAAK WALTON LEAGUE OF AMERICA, INC.; CONCERNED CITIZENS AGAINST BAILLY NUCLEAR SITE; BUSINESSMEN FOR THE PUBLIC INTEREST, INC.; JAMES E. NEWMAN; ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY MEMORANDUM FOR PETITIONER

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Only a brief response is warranted to the briefs filed by the non-federal respondents in opposition to petitioner's request, concurred in by the Solicitor General (Memo. pp. 11-12), for a summary reversal and remand to the court below for such further proceedings as may be appropriate.

1. Respondent Izaak Walton League is of course in error in asserting that a grant of the relief requested

"would require rejection of the alternative grounds presented to but not decided by the lower court" (Br. in Opp. p. 16n). The "alternative grounds" for denying the requested relief implicitly or explicitly suggested in the briefs of the nonfederal respondents (Izaak Walton League Br. in Opp. pp. 16-17; Gary Br. in Opp. pp. 4-16; Illinois Br. in Opp. pp. 6-10, 17-18) are not relevant to the issues raised by the petition and are thus not before this Court.[1]

2. The non-federal respondents deny that the Commission has consistently interpreted its regulations to give controlling weight to the actual location of dense population.[2] *E.g.*, Izaak Walton League Br. in Opp. pp. 7-10. The issue has not often arisen, since in most cases the location of the proposed nuclear power site made it unnecessary to determine the precise boundary of population concentrations. Where the issue has arisen, the Commission has been concerned, as the obvious purpose of its regulation would suggest, that there be an adequate distance between the nuclear reactor and concentrations of population, whether the

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[1] Although these "alternative grounds" are irrelevant to the Court's consideration of the petition, it should be noted that they were of course carefully considered and rejected by the Commission. For example, the respondents' extended discussion of a different site is not only irrelevant but ignores the fact that the Commission's thorough consideration of alternative sites included hundreds of pages of testimony and exhibits presented by numerous expert witnesses over many days of hearings and resulted in detailed supported findings by the Licensing Board (App. pp. 140-147) and Appeal Board (App. pp. 186-191).

[2] There is, of course, no issue in this case as to whether the Commission is required to follow its own regulation (*cf.* Yellin v. United States, 374 U.S. 109; Izaak Walton League Br. in Opp. p. 6n). The issue is solely as to the meaning of the Commission's regulations.

concentrations are nearer or more distant than a political boundary. See cases cited, Pet. p. 17.[3]

The non-federal respondents cite no case where the difference between the actual and political boundary of a population concentration was material, and where the Commission regarded the political boundary as controlling. Respondent Izaak Walton League appears to argue that extracts from Commission decisions cited in the appendix to its brief indicate that the Commission has given controlling weight to political boundaries rather than population concentrations (Br. in Opp. pp. 7-8, 1a-7a). To the contrary, these extracts point up only that, where there is no issue as to the location of population concentration, the Commission conveniently identifies the nearest pertinent population by the name of a relevant community. In fact, some of these extracts demonstrate that what the Commission considered were areas of contiguous dense population, which, in a number of instances, explicitly involved ignoring the political boundaries separating communities.[4] In any event, there is not a

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[3] Respondent Gary, indeed, acknowledges that in such cases the Commission has always regarded the actual boundary of population concentration rather than the political boundary, as determinative (Br. in Opp. p. 18).

[4] See, *e.g.*, Indiana of Michigan Electric Co.; "the Benton Harbor-St. Joseph *area*" (emphasis added); Jersey Central Power & Light Co., et al.: "the Middletown-Steelton *communities*" (emphasis added); Metropolitan Edison Co.: "*the towns* of Steelton and Harrisburg" (emphasis added); Northern States Power Co.: "the Minneapolis-St, Paul *area*" (emphasis added); Portland General Electric Co., et al.: "the Kelso-Longview *community*" (emphasis added); Tennessee Valley Authority "the *combined cities* of Scottsboro and Hollywood" (emphasis added) (Brief in Opp. pp. 3a-7a).

hint in any of the respondent's extracts—nor does respondent even allege—that any of the cited cases involved a Commission determination that a political boundary should be controlling regardless of the location of actual population concentrations.

Moreover, the non-federal respondents have failed to give any rational explanation why they—and the majority below—are agreed (*e.g.,* Izaak Walton League Br. in Opp. p. 8) that the Commission may properly accept an actual rather than a political boundary when the actual population concentration is *closer* than the political boundary, but not when it is more distant.

The decision cited by respondent Izaak Walton League (Br. in Opp. p. 8)—*Southern California Edison Co.,* ALAB-268, NRCI-75/4, 383 (1975)—provides no support for respondent's position. The statement by the League (p. 8) that the Commission "followed a similar course" to that of the court below referred to no more, as the Commission's opinion reveals, than that both the Commission, in the *Southern California* case, and the court below, in this case, found that the population center distance was less than the required 1⅓ times larger than the radius of the low population zone. The Commission's decision did not, as suggested by respondent, give controlling weight to the political boundary, but was based on "the fact that the nearest boundary (actual and political) of the San Clemente population center" was less than the required distance. ALAB-268, NRCI-75/4, 383 at 408.

3. The suggestion by respondent State of Illinois (Br. in Opp. pp. 15-16) that the Commission's finding that the actual population concentration was 4.5 miles

from the site of the proposed nuclear reactor was not adequately supported by the evidence is equally without merit. While it is not clear that the issue is before the Court (see Pet. p. 19), the suggestion that the official Geological Survey maps are meaningless ignores what they represent—the place where buildings become numerous.[5] The non-federal respondents do not deny the fact, which is of course also demonstrated by extensive testimony of the Commission staff (Tr. 6373-77, 6387-90), of petitioner's witness (Tr. 10451 and unpaged testimony immediately following; 10463; 10482 and unpaged testimony immediately following; Appl. Exh. 31) and by census data (Tr. 10685-90; App. Exh. 32), that there is no population concentration nearer than that found by the Commission.

4. The non-federal respondents challenge the validity of the Commission's interpretative regulation issued following the decision below (Illinois Br. in Opp. p. 18; Gary Br. in Opp. p. 16; Izaak Walton League Br. in Opp. pp. 13n, 15). While petitioner and the federal respondents disagree with that position, it is not an issue which the Court need consider. In all events, the interpretative regulation certainly evidences the Commission's original intent, and serves to underscore the error of the court below. Moreover, it may be appropriate to note that were one to accept this argument of the non-federal respondents, it would substantially weaken their other contention—that the

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[5] Illinois also appears to overlook the fact that the maps introduced in evidence were not prepared for the purposes of the hearing but were the official quadrangle Geological Survey maps, and that since the maps do, in fact, show individual buildings outside the "pink area" and closer to the site, they fully reveal the absence of any closer population concentration.

decision below is not important because the question of the proper interpretation of the old regulation will not arise again.

CONCLUSION

Petitioner submits that no basis has been shown why the relief requested in the petition should not be granted.

Respectfully submitted,

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